

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

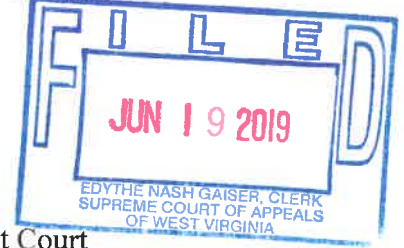
AXIALL CORPORATION and
WESTLAKE CHEMICAL
CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA., *et al.*,

Defendants.



Marshall County Circuit Court
Civil Action No. 19-C-59
Hon. David W. Hummel, Jr.

**PLAINTIFFS AXIALL CORPORATION'S AND WESTLAKE CHEMICAL
CORPORATION'S REPLY TO THE *SUA SPONTE* JUDICIAL MOTION TO
REFER CASE TO THE BUSINESS COURT DIVISION**

Plaintiffs Axiall Corporation and Westlake Chemical Corporation (collectively “Westlake”) submit this Reply to the Circuit Court of Marshall County’s *Sua Sponte* Judicial Motion to Refer Case to the Business Court Division (the “Motion to Refer”) pursuant to West Virginia Trial Court Rule 29.06(a)(4).

Westlake does not oppose transfer of this commercial property insurance coverage lawsuit (the “Coverage Action”) to the Business Court Division. However, Westlake submits this Reply to register opposition to any proposed consolidation of the Coverage Action with the two “additional related actions” identified in the Motion to Refer: *Covestro v. Alltrantek, LLC, et al.*, 18-C-202 (the “Covestro Action”) and *Axiall Corporation v. Alltrantek, LLC, et al.*, 18-C-203 (the “Axiall Action”) (collectively, the “Covestro/Axiall Actions”).¹ The Covestro/Axiall Actions do not involve common questions of law or fact supporting consolidation with the Coverage Action under West Virginia Rule of Civil Procedure 42.

¹ The Covestro Action and the Axiall Action, both filed in Marshall County, were consolidated and transferred to the Business Court Division by Administrative Order of the West Virginia Supreme Court of Appeals dated May 22, 2019.

The Coverage Action is a case brought by Westlake against its own property insurers regarding Westlake's claims for insurance coverage for its own property-damage losses at the Natrium facility in Marshall County, as well as related claims for insurance bad-faith damages and penalties. As set forth in more detail in Westlake's Complaint and the Defendant Insurers' Answer, the questions of law and fact at issue in the Coverage Action revolve around (1) whether certain property-damage losses at the Natrium facility caused by an August 27, 2016 release of chlorine at the facility are covered under the insurance policies issued by the Defendant Insurers; and (2) whether the Defendant Insurers engaged in bad-faith claims handling with respect to Westlake's insurance claim for those losses.

In contrast, although the Covestro/Axiall Actions also involve the August 27, 2016 chlorine release, they have nothing to do with the insurance-related issues central to the Coverage Action, as described below:

- **The Covestro Action.** The Covestro Action was brought by the owner of a plant neighboring the Natrium facility against several defendants, including Axiall Corporation, for damages allegedly occurring at that neighboring plant resulting from the chlorine release at the Natrium facility. The property insurance policies at issue in the Coverage Action are not third-party liability policies and do not provide insurance for the claims brought by third parties such as the plaintiff in the Covestro Action. Therefore, neither the policies nor the insurers nor the claims-handling practices at issue in the Coverage Action are implicated in the Covestro Action.
- **The Axiall Action.** The Axiall Action was filed by Axiall against vendors involved in maintenance/repair of the rail car that failed on August 27, 2016 resulting in a chlorine release at the Natrium facility. Just like the Covestro

Action, the Axiall Action does not address the interpretation of Westlake's insurance policies, the assessment of whether the Defendant Insurers have breached their contractual obligations, or the assessment of the Defendant Insurers' bad-faith claims-handling conduct, which are at the heart of the Coverage Action.

Because the Coverage Action involves insurance-related legal issues and facts that have nothing to do with the Covestro/Axiall Actions, consolidating the Coverage Action with these two actions will prejudice Westlake by delaying resolution of the Coverage Action, by entangling it in the Covestro/Axiall Actions' procedural disputes (*e.g.*, an ongoing venue battle in the Axiall Action), and by risking confusion of the Coverage Action's unique insurance-related issues and facts with the Covestro/Axiall Actions' issues and facts that are irrelevant to the Coverage Action—thereby resulting in less judicial economy and dispatch, not more. *See State ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609, 613 (W. Va. 1993) (“[W]e find that the trial court, when exercising its discretion in deciding consolidation issues under W. Va. R. Civ. P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.”).

For these reasons, Westlake does not object to the transfer of the Coverage Action to the Business Court Division as requested in the Motion to Refer, but Westlake does object to any consolidation with *Covestro v. Alltrantek, LLC, et al.*, 18-C-202 (Marshall County) and/or *Axiall Corporation v. Alltrantek, LLC, et al.*, 18-C-203 (Marshall County).

Respectfully submitted,

Dated: June 19, 2019

K&L GATES LLP

/s/ Paul C. Fuener

John M Sylvester (admitted *pro hac vice*)

john.sylvester@klgates.com

Paul C. Fuener (admitted *pro hac vice*)

paul.fuener@klgates.com

David R. Osipovich (admitted *pro hac vice*)

david.osipovich@klgates.com

Sarah M. Czipinski (admitted *pro hac vice*)

sarah.czipinski@klgates.com

Thomas C. Ryan (WVSB # 9883)

thomas.ryan@klgates.com

Travis L. Brannon (WVSB # 12504)

travis.brannon@klgates.com

K&L Gates Center

210 Sixth Avenue

Pittsburgh, PA 15222

Tel: (412) 355-6500

Fax: (412) 355-6501

Jeffrey V. Kessler (WVSB # 2026)

jkessler@bkctg.com

BERRY, KESSLER, CRUTCHFIELD,

TAYLOR & GORDON

514 7th Street

Moundsville, WV 26041

Phone: (304) 845-2580

*Counsel for Plaintiffs Axiall Corporation and
Westlake Chemical Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2019, a true and correct copy of the foregoing was served, per Trial Court Rule 29.06, via email and U.S. mail, postage prepaid, on the following counsel of record and interested parties:

Via email and U.S. Mail:

James A. Varner, Sr.
Debra T. Varner
Varner & Van Volkenburg, PLLC
200 Peck Street
Suite 102
Clarksburg, WV 26301
javarner@vv-wvlaw.com
dtvarner@vv-wvlaw.com

Myles Parker
Alexandra F. Markov
Justin M. Sumrall
Ben C. Lewis
Carroll Warren and Parker, PLLC
One Jackson Place
188 East Capitol Street, Suite 1200
Post Office Box 1005
Jackson, MS 39215-1005
mparker@cwplaw.com
amarkov@cwplaw.com
jsumrall@cwplaw.com
blewis@cwplaw.com

Attorneys for Defendants

Via U.S. Mail:

Berkeley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, WV 25401

Hon. David W. Hummel, Jr.
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

Mr. Joe Rucki
Marshall County Circuit Clerk
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

/s/ Paul C. Fuener

Paul C. Fuener

*Counsel for Plaintiffs Axiall
Corporation and Westlake Chemical
Corporation*